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08-735

In the

Supreme Court of the United States

GELEAN MARK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The case below involved a complex prosecution of multiple defendants being prosecuted on multiple drug related counts during a trial which lasted for approximately four weeks, involved over 28 witnesses and ended in a partial verdict and a declaration of a mistrial. At issue is whether the Court. having given a premature Allen Charge, having failed to *voir dire* jurors for bias and impartiality after receiving notice of possible jury misconduct and having failed to take other measures consistent with case law and published guidelines designed to avoid a jury deadlock, subsequently erred in finding manifest necessity to declare a mistrial and thus negating the bar to reprosecution per the Double jeopardy Clause of the Constitution in spite of the Court's own significant contribution to the circumstances.

LIST OF PARTIES BELOW

Pursuant to Supreme Court Rule 14.1, the undersigned counsel hereby certifies that the following persons and parties have an interest in the outcome of this case. These representations are made so the Judges of this Court may evaluate possible disqualifications or recusal pursuant to the local rules of the court.

1. The United States of America,
   Prosecutor/Appellee

2. Gelean Mark,
   Defendant/Appellant.

3. Colon, Pamela
   Trial and Appellate Counsel for Petitioner

4. Smith, Delia
   AUSA/ Counsel for Respondent

With respect to this Appeal, there are no corporate entities for purposes of disclosure.

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OPINION BELOW

The opinion by the U.S. Court of Appeals for the 3rd Circuit was not selected for publication in the Federal Reporter. Reference to the opinion is thereby limited to the following: *U.S. v. Mark*, 284 Fed. Appx. 970, 2008 WL 2673869 (C.A.3 (Virgin Islands)). The opinion is reproduced in the Appendix hereto at A-1.

STATEMENT OF JURISDICTION

The District Court of the Virgin Islands had jurisdiction of the case pursuant to Title 18, United States Code, Section 3231. The United States Court of Appeals for the Third Circuit had jurisdiction over this Appeal pursuant to Title 28, United States Code, Section 1291, to review the final decision of the District Court and pursuant to Title 18, United States Code, Section 3742(a)(1). On January 17, 2008, Swan, joined by the other Defendants, filed a motion for dismissal of the indictment based on double jeopardy. The District Court denied the motion and Defendants filed this consolidated appeal.

On January 22, 2008, after jury selection but before the jury was sworn, the Third Circuit Court of Appeals entered a temporary stay of retrial. On July 9, 2008 the Third Circuit entered an Order affirming the District Courts Order denying the Motion to Dismiss the indictment on double jeopardy grounds. On August 19, 2008 the Appellant's Petition for Rehearing En Banc was denied and the Circuit issued it's Mandate on August 27, 2008. In the meantime the District Court scheduled the retrial of the Defendants for October 6, 2008.

On September 16, 2008 Petitioners filed an *Emergency Motion For Recall Of The Mandate and Stay of Trial* with the Third Circuit Court of Appeals. The United States Supreme Court has Jurisdiction pursuant to 28 United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

Fifth Amendment United States Constitution

> No person shall be held for a capital, or otherwise infamous crime, unless he or she is on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

> Third Circuit Model Jury Instruction 9.06, http://www.ca3.uscourts.gov/criminaljury/tocandinstructions.htm (emphasis and citation in original):

If the jury indicates that it is still deadlocked after the court has given instruction 9.05, the Committee recommends the following procedure be followed and recorded.

First, to determine whether a supplemental charge is necessary, the court should question the foreperson, but must take steps to ensure that the foreperson does not reveal either the numerical split on the jury or the position of the majority. *See United States* v. *Fiorilla,* 850 F.2d 172, 175 (3d Cir. 1988); *Government of Virgin Islands* v. *Romain,* 600

F.2d 435 (3d Cir. 1979). For example, the court may address the foreperson as follows:

> Advise me of the status of deliberations. If the jury is divided, I do not want to know the numbers or the direction. I only want to know whether in your judgment there is a reasonable probability that the jury can arrive at a unanimous verdict in this case if sent back for further deliberations.

Second, if the foreperson indicates that the jury is deadlocked, the court should question each juror, asking "Do you agree that there is a hopeless deadlock which cannot be resolved by further deliberations?"

Third, if jurors' answers reflect that they are deadlocked, the court should excuse the jury and hold a hearing with counsel and the defendant. The court should elicit the positions of all the parties, taking particular care to get a record of the position of the defendant(s) and defense counsel on whether to declare a mistrial. If the court declares a mistrial that is not required by manifest necessity, the Double Jeopardy Clause will bar a retrial of the case unless the defendant consented to the mistrial. *See United States* v. *Dinitz,* 424 U.S. 600 (1976); *United States* v. *Rivera,* 384 F.3d 49 (3d Cir. 2004). When the defendant does not consent to the mistrial, the courts consider a number of factors to determine whether the mistrial represents an abuse of discretion and whether it bars further prosecution:

1. a timely objection by the defendant;
2. the jury's collective opinion that it cannot agree;
3. the length of jury deliberations;
4. the length of the trial;
5. the complexity of the issues presented to the jury;
6. any proper communications between the judge and jury;
7. the effects of exhaustion and the impact of coercion of further deliberations on the jury.

See U.S. v. Crosley, 634 F. Supp. at 31 (citing *Arnold v. McCarthy,* 566 F.2d 1377, 1387 (9th Cir. 1978).

If the court concludes that a mistrial is necessary, the court should make an explicit finding of manifest necessity. For example, the court may state:

Based on an evaluation of the following factors *(state factors relevant to case),* I find that the jury is unable to reach a verdict, that further deliberations would be futile, and that there is no alternative but to declare a mistrial for reasons of manifest necessity and to dismiss the jury.

Fourth, the court should call the jury back into the courtroom and discharge the jurors.

STATEMENT OF THE CASE

On December 19, 2006 the defendants in this case were charged with conspiracy and possession with intent to distribute cocaine. Defendant Gelean was specifically charged with one count of violating 18 U.S.C. § 846, one count of violating 18 U.S.C. §§ 841(a)(1) and § 841(b)(1)(A)(ii)(II), one count of violating 21 U.S.C. §§ 952(a), 960(b)(1)(B)(ii) and 963, and twelve counts of violating 18 U.S.C. § 955.

The District Court of the Virgin Islands exercised jurisdiction over the case pursuant to Title 18, United States Code, Section 3231. Defendants' jury trial began on September 5, 2007 and ended in a mistrial on October 3, 2007. The trial lasted about four weeks, and the jury was sequestered for deliberations, which began on September 26.

On September 28, the third day of deliberations, the jury submitted a note informing the court that it had reached a partial verdict and could not reach a unanimous decision with respect to the remaining counts. The District Court informed the lawyers of the situation and asked for their input, noting that the court's inclination was to give the jury an *Allen* charge. Counsel for Moses asked if it was the Court's custom "to inquire of the jury, who is giving you a note saying that they cannot reach a unanimous vote, and ask something like, if you were to ask them to go back and return to deliberations, are they sure that it's not going to change, or would further deliberations be a waste of time?" Appendix (App. at A-4). The District Court replied in the negative, explaining, "I would be poking into their deliberative process. I either give them an [Allen charge], or I

don't." *Id.* Ultimately, defense counsel objected to an Allen charge this early in deliberations. Nevertheless, the court gave the jury the charge.

Soon after this *Allen* instruction, an incident occurred amongst the jury, with one juror refusing to deliberate due to comments between other jurors regarding a defendant. Deliberations were not scheduled to occur the following day, September 29. When deliberations resumed on September 30, and against defense counsel's objections, the District Court sealed the proceedings for a *voir dire* of only the juror who submitted the note refusing to deliberate. The next day, October 1, the jury returned a partial verdict of guilty with respect to Mark and co-defendant Henry Freeman on Count I.

The court polled the jurors individually on this verdict and instructed the jury to return to its deliberations on the remaining counts. Two hours later, the jury sent another note to the court stating that the jurors were unable to reach a unanimous verdict on any other matter they were considering. The District Court again consulted with counsel and then brought the jury back into the courtroom and told the jurors, "I received your note, and the Court appreciates the work you've done. I know you've worked long and hard on this matter. And I know that sometimes there is, there is a, you come to a position where you simply can't reach unanimous decisions on certain matters. The Court appreciates all your effort in trying to reach unanimity notwithstanding that." (App. at A-5). The jury then left the courtroom to deliberate on the drug amounts under the Count 1 guilty verdict. The Court held proceedings regarding the forfeiture issue in this

case before turning to the matter of the remaining defendants.

Because the District Court had already prematurely and improperly given an *Allen* charge, such an instruction was no longer an option. The court conferred with defense counsel, who suggested no alternatives on how to proceed, concluding that "The Court should rule, Your Honor." *Id.* In fact, Moses's lawyer indicated that "the only alternative [he saw] under the rules is a mistrial." App. at A-6. Thereafter, the District Court made a manifest necessity determination, stating:

> The jury has been listening to evidence in this case for the better part of three weeks, three-plus weeks. They've been deliberating for close to one week. They sent one note, in which they indicated they had reached unanimity on some matters, and they were unable to reach unanimous decision on other matters. They have, they were subsequently instructed that they were to continue deliberating. That, I believe, was on Friday. They have since deliberated for most of today, which is Monday. They deliberated on the weekend, on Sunday, and whatever remained on Friday when I gave the instruction. Under those circumstances, the Court finds there is manifest necessity for a mistrial as to those matters and those defendants on which the defendants-or rather the jury could not reach a unanimous decision. So the Court finds there is manifest necessity. A specific ruling on the mistrial, I'll issue a written opinion on that. *Id.*.

Counsel for Mark objected to the manifest necessity finding, arguing that the court gave a premature *Allen* charge.

Retrial was scheduled for January 22, 2008. On January 17, 2008, Swan, joined by the other Defendants, filed a motion for dismissal of the indictment based on double jeopardy. The District Court denied the motion and Defendants filed this consolidated appeal. On January 22, after jury selection but before the jury was sworn, the Third Circuit Court of Appeals entered a temporary stay of retrial.

On July 9, 2008 the Third Circuit entered an Order affirming the District Court's Order denying the Motion to Dismiss the indictment on double jeopardy grounds and Appellants' petition for rehearing en banc was denied on August 19, 2008.

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION FOR CERTIORARI BECAUSE THE THIRD CIRCUIT HAS SANCTIONED AN IMPERMISSIBLE DEPARTURE BY THE DISTRICT COURT OF THE ACCEPTED AND USUAL REQUIREMENTS FOR FINDING MANIFEST NECESSITY TO DECLARE A MISTRIAL AND HAS CONDONED THE VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS NOT TO BE IMPROPERLY PLACED IN DOUBLE JEOPARDY.

The United States Constitution mandates that no "person be subject for the same offense to be twice put in jeopardy of life or limb." *United States Constitution, Amendment* 5. The Fifth Amendment's bar on reprosecution of the accused is a cherished "fundamental American right." *United States ex rei. Joseph Russo v. Superior Court of New Jersey,* 483 F.2d 7, 12 (3d Cir. 1973). The text of the Double Jeopardy Clause may be only a couple of hundred years old, but the "[p]rotections against double jeopardy are ancient." *United States v. Rivera,* 384 F.3d 49, 54 (3d Cir. 2004) (tracing the principle of double jeopardy from the Greek orator Demosthenes through Roman law to the reign of King James II "when prosecutions which subjected an individual to double jeopardy began to be barred"). The Third Circuit has enumerated these protections at great length:

> The reasons why this valued right merits constitutional protection are worthy of repetition. Even if the first trial is not

> completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

United States v. McKoy, 591 F.2d 218, 221 (3d Cir. 1979) (quoting *Arizona v. Washington,* 434 U.S. 497, 503-505 (1978); *Russo,* 483 F.2d at 12

There is a deep concern that the government not use its vast power to subject its citizens to repeated prosecution for the same alleged offense. "Reprosecution increases the possibility that an innocent man may be found guilty; and it forces a defendant through the ordeal for another criminal trial, involving additional anxiety, insecurity, embarrassment, and expense"). In addition to these protections, "the defendant may have been deprived of a valued right to have his trial completed by a particular tribunal which he believes may be favorably disposed to his fate." *Russo,* 483 F.2d at 12; citing *Green v. United States* 355 US 189 (1950) and *United States v. Jorn* 400 U.S. 410 (1971) *see also Washington,* 434 U.S. at 503.

There are two exceptions to the bar against reprosecution and neither applies in this case. The first is when "[m]istrials [are] declared with the

defendants' consent" and the second is upon a finding of manifest necessity. *Morton,* 112 F.3d at 133. Here, the "consent exception" is not present as Appellants objected to the District Court's granting of a mistrial. (App. at A-6).

The second exception is not so easily dispensed. Building upon the lofty protections afforded by the Double Jeopardy Clause, in *United States v. Perez,* Justice Story first announced the constitutional standard of manifest necessity for declaration of a mistrial:

> We think, that in all cases of this nature, the law has invested the Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all of the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.

22 U.S. 9 Wheat 579, 580 (1824) (emphasis added). Although there are no "hard and fast rules" about when manifest necessity occurs, the circumstances under which a mistrial is declared must be "extraordinary." *Russo,* 483 F.2d at 13 (collecting Supreme Court cases); *Rivera,* 384 F.3d at 55 ("The power to declare a mistrial" ought to be used with the greatest caution, under urgent circumstance, and for very plain and obvious causes.").

Indeed, "the government generally must demonstrate that, under the circumstances confronting the trial judge, he had no alternative to the declaration of a mistrial and only by considering and exhausting all other possibilities can the judge ensure that the defendant has received the full protection of the *Double Jeopardy Clause." McCoy,*

591 F.2d at 222 (citation and quotation omitted). *Rivera,* 384 F.3d at 57 ("Critically, a mistrial must not be declared without prudent consideration of reasonable alternatives."). Any lingering doubt "should be resolved in favor of the liberty of a citizen." *Morton,* 112 F.3d at 138 (quotation and citation omitted); *Downum v. United States,* 372 U.S. 734, 738 (1963). "Even in the classic case of an apparently deadlocked jury, a reviewing court must examine the circumstances surrounding the discharge to determine if the trial court exercised its limited discretion to abort the proceedings in a manner consistent with the protection of the defendant's *Fifth Amendment* rights." *United States v. Gordy,* 526 F.2d 631,635 (5th Cir. 1976). The trial court's determination to abort a criminal proceeding where jeopardy has attached "is not one to be lightly undertaken" as the interest of the defendant in having his fate decided by the jury first impaneled is a weighty one. *Illinois v. Summerville* 410 U.S. 458 (1973), citing *United States v. Jorn,* 400 U.S. 470 (1971)

In *United States v. Webb,* 516 F.2d 1034 at 1046 (3d Cir. 1975) the Third Circuit went to great lengths in delineating a process that should be considered before a court declares a mistrial which included the length of the trial, its nature and complexity.

The Third Circuit is not alone in requiring that trial courts should consider the nature and complexity of the case, the length of the trial, the length of the deliberation and the jurors own statements after polling of the jury. *See e.g., United States v. Razmilovic,* 498 F.3d 136 (2d Cir. 2007); *United States v. Byrski,* 854 F.2d 955, 962 (7th Cir.

1988); *United States v. Horn,* 583 F.2d 1124, 1129 (10th Cir. 1978); *United States v. Gordy,* 526 F.2d 631, 636-37 (5th Cir. 1976).

Polling of the jury is also paramount in ascertaining whether manifest necessity exists. Reinforcing this point are the Third Circuit's Pattern Jury Instructions drafted by a committee of eminent practitioners and judges. *See generally* Committee for Model Criminal Jury Instructions, available at http://www.ca3.uscourts.gov/criminaljury/tocandinstructions.htm (last visited February 21, 2008 ("Model Jury Instructions"). See full text *infra.*

When these principles of law and prescribed process are applied to the case at bar, the conclusion is that the Third Circuit should have found that the District Court failed to adhere to the scrupulous exercise of judicial discretion required by *Perez* 22 U.S. at 580 and that a second trial impermissibly places the Appellants "twice [put] in jeopardy of life or limb." *United States Constitution, Amendment 5,* and that in doing so, the District Court has departed from the vast body of contrary authority promulgated by this Court, the Third Circuit and other Courts of Appeals.

II. COMPLEXITY OF THE CASE MAKES IT AN APPROPRIATE VEHICLE FOR THE SUPREME COURT TO GRANT CERTIORARI

This case is an extraordinarily complex case evidenced by the number and nature of the witnesses, the allegations of the nature of the conspiracy and the acts perpetrated to achieve its object, deep legal issues, trial publicity and sequestration. The indictment charged ten defendants, six of which were brought to trial, with

fourteen violations of the Controlled Substances Act. (App. at A-3-4). The number of defendants and counts alone creates a complex case. *See e.g. Razmilovic,* 498 F.3d at 144 (citing *Byrski,* 854 F.2d at 963 for the proposition that a trial is "complex" because it involved seven defendants and multiple charges against each defendant). There were an extraordinary amount of witnesses and the depth of their testimony presented complicated issues. The alleged nature of the conspiracy is a bottomless labyrinth that seemingly encompasses every alleged bad act of the Appellant's conspirators, as well as an exorbitant number of specifically alleged acts. In a checkered and discombobulated morass of testimony, the government's evidence went from microscopic to macroscopic with the turn of a witness. This led to a number of highly technical legal issues that generated hundreds of sidebars and conferences outside of the presence of the jury.

The government presented the testimony of 19 witnesses, including expert testimony, while the Appellants presented 9 witnesses. Through its numerous witnesses, (at one point the Government claimed 37, App. at 27), it attempted to prove two allegedly separate conspiracies that spanned two continents, twenty years, involved a colossal number of co-defendants as well as numerous intertwined, parallel or separate conspiracies. Some of the government's key witnesses, such as Elton Turnbull, James Springette and Glenson Isaac, presented tremendous credibility issues for the Jury. Indeed, Appellant Swan's closing statement is illustrative of the closings given by the other Appellants and illuminates the inconsistencies, vagaries, testimonial

conflicts, biases, motive and lack of corroboration of the government's key witness. (App. at 28-44).

In its closing argument even the government pointed out these credibility issues and even alluded that the government's lead witnesses will probably end up in a place somewhere other than at the Pearly Gates. (App. at 27)

In cases such as the case at bar, where credibility determinations are at the core of the case, courts should be cognizant of inevitable contrasts and opinions, and courts should at the very least inquire of the jury before declaring a mistrial and allot more time for deliberations. *See e.g., Russo,* 483 F.2d at 12 (3d Cir. 1973) (quoting *United States v. Lansdown,* 460 F.2d 164, 169 (4th Cir. 1972)).

The emotional atmosphere of the trial was magnified by pretrial and trial publicity. At the close of trial the government moved for sequestration arguing that the publicity was too infectious to allow the jurors to remain unsequestered. This motion was granted minutes before jury deliberations without prior notice to either the defense or the jurors. Under these circumstances, there should be no doubt that the complexity of the case lent itself to a more exhaustive effort on behalf of the trial court in resolving the deliberative stalemate of the jury as required by the Model Rules and precedence and that absent such effort manifest necessity was not present.

III. THE LENGTH OF TRIAL MITIGATES AGAINST A FINDING OF MANIFEST NECESSITY

The trial lasted approximately twenty-five days, including deliberations, the Government said it best in closing that "[i]t has been three and a half long, long weeks, with long, long days, and long, long testimony." (App. at 26). Accordingly, while a twenty-five day trial is protracted by any calculation, the complexity and intensity of the testimony and publicity served to amplify the length of the trial and prolong the jury deliberations.

The actual length of jury deliberations is unclear in the record. The jury was released to deliberate on September 26 and the Court declared a mistrial on October 1. The Jury did not deliberate on September 29. Unfortunately, the nature of the sequestration is not on the record and accordingly it is not possible for the Petitioners to determine when the Jury was actually deliberating, exclusive of logistical events such as gathering belongings for sequestration, sleeping, eating, etc. Further complicating the process is that the Court sent the forfeiture issue to the Jury before the end of deliberations on the charges in the indictment thereby befuddling the Jury's deliberations upon the remaining counts and the remaining Defendants.

Case law requiring that all doubts must be resolved in favor of the defendant, *see Downum*, 372 U.S. at 738, was ignored by the District Court and the Third Circuit. Hence, the thorough process delineated in numerous Supreme Court and Third Circuit cases and the Model Rules were completely ignored to the detriment of the Petitioners.

IV. THE COURT'S COMMUNICATION WITH THE JURY WAS INADEQUATE TO SATISFY A FINDING OF MANIFEST NECESSITY AND VIOLATED THE PETITIONERS SUBSTANTIVE DUE PROCESS RIGHTS

The communication between the District Court and the Jury lacked requisite depth to satisfy the finding of manifest necessity.

When a personality conflict arose between two jurors concerning *ad hominem* attacks on the Appellants, the District Court should have immediately *voir dired* all of the jurors involved in the conflict. *Waldorf v. Shuta,* 3 F.3d 705, 710 (3d Cir. 1993) (The Court must conduct a thorough *voir dire* of all jurors with whom the improper conduct occurred.) This is necessary to determine whether the Defendants suffered substantial prejudice from improper juror communication. *See i.e. U.S. v. Gilsenan,* 949 F2d. 90 (3d Cir. 1991).

Instead of performing a thorough *voir dire* of the jurors involved and without any notification to the Defendants below, the District Court adjourned the Jury for the weekend. When the parties reassembled and the jury was already hours into deliberation *two days later,* the District Court elicited comment regarding *voir dire* of the Jury and over defense objection, the District Court *voir dired* only the one Juror who had informed the District Court of the attacks on the Defendants. The District Court did not *voir dire* any other juror.

This delayed, abbreviated *voir dire* given by the Court, robbed it and the parties of their opportunity to assess the situation contemporaneously and determine what, if any jury bias may have existed

and what prejudice to deliberations might have occurred. Failure to immediately and thoroughly *voir dire* the entire jury at the time of the incident constituted a violation of the Defendants substantive right to determine whether any jury bias existed or whether the jurors actions constituted misconduct. *See, Shuta,* 3 F.3d at 719.

Further, the District Court failed to conduct thorough and detailed questioning of the Jury about the inability to agree. Although the Jury sent two notes stating that it was unable to agree, the Jury never stated that they were "hopelessly deadlocked" and the District Court never asked whether continued deliberations would be fruitful. Prior statements about inability to agree does not resolve the issue, but only begs of questioning the jury. *See e.g., United States* v. *Byrski,* 854 F.2d 955, 962 (7th Cir. 1988) ("[B]ecause the state of jury deliberations is ever-changing, prior evidence of deadlock is not always dispositive of the jury's present inability to reach a unanimous verdict."). *Horn,* 583 F.2d at 1127 ("[T]he present inability of the jury to agree is not the problem. Rather, the question is whether such an agreement is possible.").

Most importantly, the District Court never questioned the jurors, either individually, as a group, or via the foreperson, as to where they stood on coming to a unanimous verdict. Indeed, the District Court was flatly against even the most basic inquiry of the Jury. (App. at A-4).

In a lengthy, complex case such as this failure to make any inquiry before declaring a mistrial flies in the face of the precedence of this Court and the Third Circuit and their prescribed requirements for

of manifest necessity. *See e.g., McCarthy,* 566 F.2d at 1387 ("Upon receiving a communication from the jury stating that it cannot agree, the trial court must question the jury to determine independently whether further deliberations might overcome the deadlock."); *Horn,* 583 F.2d at 1129 (finding error that trial court had received jury note indicating that jury was unable to agr[illegible] but had not directly discussed with jury whether they could reach agreement before declaring mistrial); *Gordy,* 526 F.2d at 636-37 (opining that foreman's statement that jury was hung insufficient to determine whether no verdict could be reached because no dialogue "was developed with the jurors individually"); *Lansdown,* 460 F.2d at 169 ("The most important consideration is whether there is a possibility that the jury can reach a verdict within a reasonable time. The most reliable source as to this information is the jury itself."); *Russo,* 483 F.2d at 12 ("Before the defendant loses his *Fifth Amendment* right, we think that the trial judge must at least determine whether the jury is approaching a verdict."); *Webb,* 516 F.2d at 1044 (error for the Judge to inquire solely of the jury foreperson and not the entire jury); Model Jury Instruction 9.06.

Hence, the District Court's failure to thoroughly and contemporaneously *voir dire* the jury robbed it and the Defendants of any opportunity to determine whether bias existed or if they were substantially prejudiced by the statements made by the juror. The District Court also failed to adequately communicate with the jury thereafter to determine whether a deadlock did in fact exist such that further deliberations would be futile thus abdicating its duty to be thorough and vigilant in protecting the

Petitioner's rights against being placed in double jeopardy.

V. THE COURT FAILED TO EXHAUST ALL POSSIBILITIES PRIOR TO DECLARING A MISTRIAL

Finally, the "government generally must demonstrate that, under the circumstances confronting the trial judge, he had no alternative to the declaration of a mistrial and only by considering and exhausting all other possibilities can the judge ensure that the defendant has received the full protection of the *Double Jeopardy Clause." McKoy,* 591 F.2d at 222 (citations omitted); *Love v. Morton,* 112 F.3d 131, 137 (3d Cir. 1997) ("The trial judge must consider and exhaust all other possibilities.").

The key alternative of giving the *Allen* Instruction was unavailable because the District Court had already, over defense counsel's objection, already given the *Allen* Charge. This premature instruction greatly handicapped the District Court's alternatives when the correct time arose to seek alternatives. However, even without the option of giving the *Allen* instruction, the District Court had a number of options available to it other than requesting and declaring a mistrial. The District Court could have instructed the Jury to continue deliberations, polled the Jury to determine how close it was to a verdict on any of the counts against any of the Appellants, instructed the Jury concerning the availability of a partial verdict against the remaining Appellants and unsequestered the Jury. *See e.g., Razmilovic,* 498 F.3d at 145 (listing the alternatives that should be considered and opining that "the decision not to pursue any of [the

alternatives] without any evidence in the record as to why further action would have been appropriate is a factor that [Courts of Appeal] consider in assessing whether the trial judge" was in error).

The fact that the District Court mishandled the jury by failing to use alternative options prior to an *Allen Charge,* failing to contemporaneously *voir dire* all the jurors involved in the altercation and generally failing to take any subsequent actions to remedy the premature *Allen Charge,* amounts to the Court abdicating its role as referee and coach and having becoming a significant contributing factor in the frustration of the deliberative process, hence becoming its own instrument in the creation of the so called manifest necessity.

CONCLUSION

The Double Jeopardy "prohibition is not against being twice punished, but against being twice put in jeopardy." *Lansdown,* 460 F.2d at 171 (quoting *United States v. Ball,* 163 U.S. 662,669 (1896)); or being subjected to the repeated burden of a trial. *Webb,* 516 F.2d at 1041. A burden that includes the irreparable harm of severe negative emotional, psychological, financial and even physical effect on the Defendants.

A trial of this complexity and length wreak havoc not only on the jury and the Court's already overburdened docket but particularly on the Defendants. It is precisely ".....because the determination of manifest necessity for a mistrial depends on the state of the jury rather than the state of ... the court's docket," that the District Court should have recognized that a retrial in this case places the Appellants twice in jeopardy. *Gordy,* 526 F.2d at 632.

Moreover, when the Court becomes the instrument of the creation of the so called manifest necessity rather than a catalyst for the resolution of jury stalemate and conflict by failing to *voir dire* the jury adequately and contemporaneously about potentially prejudicial communications, by acting prematurely in its delivery of what should have been its charge of last resort and by failing to exhaust all of its available remedies prior to the declaration of a mistrial it becomes manifestly unjust and inequitable for that same Court, having abdicated its responsibilities, to then rely on the results of its actions to support the placement of the Defendants in Double Jeopardy.

Because of the violation of the Petitioners' Constitutional Rights resulting from the misapplication and almost total disregard of the standards for manifest necessity in granting a mistrial and accumulation of errors, this case is an appropriate vehicle for the Court to clarify the standards to be utilized as applied to the facts of this case and to grant a Petition for Writ of Certiorari.

WHEREFORE, Petitioner prays that this Honorable Court, grant its Petition for Writ of Certiorari to review the Third Circuits ruling upholding the actions of the District Court.

Respectfully Submitted,

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-1177

UNITED STATES OF AMERICA

v.

GELEAN MARK,

Appellant

No. 08-1178

UNITED STATES OF AMERICA

v.

DORIAN SWAN,

Appellant

No. 08-1312

UNITED STATES OF AMERICA

v.

KELVIN MOSES,

Appellant

No. 08-1356

UNITED STATES OF AMERICA

v.

VERNON FAGAN,

Appellant

No. 08-1358

UNITED STATES OF AMERICA

v.

WALTER ELLS,

Appellant

Appeals from the District Court
of the Virgin Islands
(Crim. No. 2006-80)
District Judge: Hon. Curtis V. Gomez

Argued May 8, 2008
Before: RENDELL, FUENTES, and CHAGARES,
Circuit Judges.
(Entered: July 9, 2008)

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Asst. Federal Public Defender
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Counsel for Appellants

Delia Smith
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Counsel for Appellee

OPINION OF THE COURT

CHAGARES, Circuit Judge.

The defendants in this case were charged with conspiracy and possession with intent to distribute cocaine. After a lengthy jury trial and partial verdict, the District Court declared a mistrial as to the remaining charges and defendants. Because the District Court's declaration of a mistrial was supported by manifest necessity, we will affirm the court's order denying the defendants' motion to dismiss the indictment on double jeopardy grounds.

I.

On December 19, 2006, a federal grand jury charged Appellants/Defendants Dorian Swan (Swan), Gelean Mark (Mark), Vernon Fagan (Fagan), Walter Ells (Ells), and Kelvin Moses (Moses) in a fourteen-count indictment. Count I charged conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846;

Count II charged conspiracy to import cocaine in violation of 21 U.S.C. § 963; and Count XIV charged possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841.[1]

Defendants' jury trial began on September 5, 2007 and ended in a mistrial on October 3, 2007. The trial lasted about three weeks, and the jury was sequestered for deliberations, which began on September 26. On September 28, the third day of deliberations, the jury submitted a note informing the court that it had reached a partial verdict and could not reach a unanimous decision with respect to the remaining counts. The District Court informed the lawyers of the situation and asked for their input, noting that the court's inclination was to give the jury an Allen charge. Counsel for Moses asked if it was the Court's custom "to inquire of the jury, who is giving you a note saying that they cannot reach a unanimous vote, and ask something like, if you were to ask them to go back and return to deliberations, are they sure that it's not going to change, or would further deliberations be a waste of time?" Appendix (App.) 98. The District Court replied in the negative, explaining, "I would be poking into their deliberative process. I either give them an [Allen charge], or I don't." Id. Ultimately, defense counsel objected to an Allen charge this early in deliberations; nevertheless, the court gave the jury the charge.

Soon after this instruction, an incident occurred amongst the jury, with one juror refusing to deliberate due to comments between other jurors

---

[1] The District Court dismissed Counts III through 1 XIII on a judgment of acquittal; therefore, this appeal addresses only Counts I, II, and XIV.

regarding a defendant. Deliberations were not scheduled to occur the following day, September 29. When deliberations resumed on September 30, and against defense counsel's objections, the District Court sealed the proceedings for a *voir dire* of only the juror who submitted the note refusing to deliberate. The next day, October 1, the jury returned a partial verdict of guilty with respect to Mark and co-defendant Henry Freeman on Count I. The court polled the jurors individually on this verdict and instructed the jury to return to its deliberations on the remaining counts. Two hours later, the jury sent another note to the court stating that the jurors were unable to reach a unanimous verdict on any other matter they were considering. The District Court again consulted with counsel and then brought the jury back into the courtroom and told the jurors, "I received your note, and the Court appreciates the work you've done. I know you've worked long and hard on this matter. And I know that sometimes there is, there is a, you come to a position where you simply can't reach unanimous decisions on certain matters. The Court appreciates all your effort in trying to reach unanimity notwithstanding that." App. 158. The jury then left the courtroom to deliberate on the drug amounts under the Count I guilty verdict. The Court held proceedings regarding the forfeiture issue in this case before turning to the matter of the remaining defendants. Because the District Court had already given an Allen charge, such an instruction was no longer an option. The court conferred with defense counsel, who suggested no alternatives on how to proceed, concluding that "The Court should rule, Your Honor." App. 173. In fact, Moses's lawyer

indicated that "the only alternative [he saw] under the rules is a mistrial." App. 176. The District Court made a manifest necessity determination, stating:

> The jury has been listening to evidence in this case for the better part of three weeks, three-plus weeks. They've been deliberating for close to one week.
>
> They sent one note, in which they indicated they had reached unanimity on some matters, and they were unable to reach unanimous decision on other matters.
>
> They have, they were subsequently instructed that they were to continue deliberating. That, I believe, was on Friday.
>
> They have since deliberated for most of today, which is Monday. They deliberated on the weekend, on Sunday, and whatever remained on Friday when I gave the instruction.
>
> Under those circumstances, the Court finds there is manifest necessity for a mistrial as to those matters and those defendants on which the defendants—or rather the jury could not reach a unanimous decision.
>
> So the Court finds there is manifest necessity.
>
> A specific ruling on the mistrial, I'll issue a written opinion on that.

App. 176-77.

Counsel for Mark objected to the manifest necessity finding, arguing that the court gave a premature Allen charge. Retrial was scheduled for

January 22, 2008. On January 17, 2008, Swan, joined by the other Defendants, filed a motion for dismissal of the indictment based on double jeopardy. The District Court denied the motion and Defendants filed this consolidated appeal. On January 22, after jury selection but before the jury was sworn, this Court entered a temporary stay of retrial. We have jurisdiction to review this appeal pursuant to 28 U.S.C. § 1291 and the collateral order doctrine. See Abney v. United States, 431 U.S. 651, 659 (1977); United States v. Venable, 585 F.2d 71, 74 (3d Cir. 1978).

II.

The Double Jeopardy Clause of the Fifth Amendment guards against multiple trials or punishments for the same offense and protects a defendant's right to have his trial completed by a particular jury. Wade v. Hunter, 336 U.S. 684, 689 (1949). In limited circumstances, however, a second trial after mistrial is permitted, including where manifest necessity justifies ordering a mistrial. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824). Reprosecution is permitted when a jury's inability to agree upon a verdict necessitates a mistrial. Id.

Defendants contend that manifest necessity did not justify a mistrial in this case. The question of whether manifest necessity existed to support the District Court's declaration of a mistrial is a mixed question of law and fact over which we exercise plenary review. See United States v. Rivera, 384 F.3d 49, 55 (3d Cir. 2004). A district court enjoys broad discretion to declare a mistrial where a jury is genuinely unable to reach a verdict. See Arizona v.

Washington, 434 U.S. 497, 505 (1978); Crawford v. Fenton, 646 F.2d 810, 817 (3d Cir. 1981); see also United States ex rel. Webb v. Court of Common Pleas, 516 F.2d 1034, 1040 (3d Cir. 1975) (stating that "the genuine inability of the jury to reach a unanimous verdict within a reasonable period constitutes 'manifest necessity' for discharge of the jury and retrial of the accused"). Still, a district court may declare a mistrial without barring reprosecution "only in extraordinary circumstances." United States ex rel. Russo v. Superior Court of New Jersey, 483 F.2d 7, 13 (3d Cir. 1973).

There are no "hard and fast rules" regarding what conditions constitute manifest necessity. Russo, 483 F.2d at 13. Instead, this determination must be based on the particular facts and circumstances of the case giving rise to the mistrial declaration. See Crawford, 646 F.2d at 817. Accordingly, we must determine whether the facts of record in this case establish that the District Court "exercised the 'scrupulous' and 'extraordinary' care that the Supreme Court has mandated for the protection of a defendant's constitutional right to be spared repeated attempts to convict him" before declaring a mistrial. Webb, 516 F.2d at 1043. Factors to be considered include: the length of trial and deliberations, the complexity of the issues, the jury's communications to the judge (including whether it states that it is unable to agree or is hopelessly deadlocked), the judge's polling of the jury, the parties' opportunity to comment on the propriety of a mistrial, and the judge's prudent consideration of reasonable alternatives. See, e.g., United States v. Byrski, 854 F.2d 955, 961 (7th Cir. 1988) (listing several factors); United States v. Gordy, 526 F.2d

631, 635-36 (5th Cir. 1976) (same). Based on the record before us, we conclude that manifest necessity justified the District Court's mistrial declaration.

First, the jury's communications with the trial judge clearly indicated a deadlock. The jury's note of September 28 stated that "[t]here's a partial verdict [as to Count 1] . . . . [and] as to the other matter, the jury has said that they cannot come to a unanimous decision." App. 98. Similarly, on October 1, the District Court reported, "We have another note. In essence, the jurors are unable to reach a unanimous decision on any other matter that they're considering."[2] App. 148.

Furthermore, the District Court consulted with counsel and canvassed alternatives to mistrial as required by Federal Rule of Criminal Procedure 26.3 and this Court's caselaw. See Fed. R. Crim. P. 26.3 (providing that "[b]efore ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives."); see also United States v. Tinney, 473 F.2d 1085, 1089 (3d Cir. 1973) (observing that a trial judge "must seek

---

[2] In Webb, this Court 2 held that double jeopardy barred retrial after a mistrial because manifest necessity did not support the district court's mistrial declaration. The Webb jury did not submit any notes to the district court. Instead, "the judge on his own initiative . . . asked the jury to return to the courtroom" and inquired of the foreperson whether there was any hope of arriving at a verdict. See 516 F.2d at 1043 ("the impetus for a mistrial was provided solely by the judge rather than by the jurors"). By contrast, in the matter at hand, the deadlock issue was raised by the jury itself in two different notes indicating that it could not reach a unanimous verdict.

out and consider all avenues of cure to avoid trial abortion" (citation and quotation omitted)). When the District Court received the jury's note of September 28, it informed the lawyers of the situation, asked if "Counsel want to be heard on that?", and gave the attorneys the opportunity to respond. App. 91. Likewise, before making its manifest necessity finding, the court gave counsel the chance to be heard. See App. 171-176 (asking, for example, "Do you think there is manifest necessity for, to discharge this jury and declare a mistrial as to your client?"). Defendants argue that the District Court erred by dismissing the jury as to those defendants against whom no verdict had been reached and waiting until later in the day to make a finding of manifest necessity. They contend that because the District Court advised the jury that it would no longer be deliberating on the remaining defendants and counts without making a concurrent manifest necessity finding it "should be precluded from making such a finding after dismissal." Appellant Reply Br. at 8. Defendants offer no support for this assertion, nor did they raise this objection when the District Court asked for suggestions before entering its manifest necessity determination. This was not a case where the court's mistrial declaration caught counsel by surprise.[3]

---

[3] Defendants assert that the District Court gave a premature Allen charge on September 29 and by the time the court consulted defense counsel for alternatives on October 1, "the only option left was rule that the jurors continue to deliberate or declare a mistrial . . . ." Appellant Reply Br. at 7-8. The jury, however, had indicated its lack of unanimity in its September 28 note, and it was within the District Court's discretion to give the Allen charge then. See, e.g., United States v. Graham, 758 F.2d 879, 884 (3d Cir. 1985) ("The length of time a jury may be

While "there is no uniform minimum period during which a jury must deliberate before the court may declare a hung jury," Webb, 516 F.2d at 1044, Defendants assert that the lengthy trial involving complex issues, the jury's sequestration for deliberations, and the jury's relatively short time spent deliberating fail to support the District Court's declaration of a mistrial.[4] We agree that this was not a situation in which the jury's physical condition or protracted deliberations necessitated a mistrial. Cf. Crawford, 646 F.2d at 819 (finding manifest necessity where "jurors were fatigued, frustrated . . ., unable to concentrate, unwilling to guess, and persistent in their demands to return home and be relieved from their service as jurors.") Nevertheless, the jury's communications to the judge, combined with the District Court's discussions with counsel regarding a mistrial and potential alternatives,

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kept for the purpose of deliberation is a matter within the discretion of the trial judge"). See also United States v. Martinez, 446 F.2d 118, 120 (2d Cir. 1971) ("[W]e will not place an arbitrary time limit on how long a jury must deliberate before an Allen charge is appropriate.").

[4] Defendants also argue that the District Court failed to poll the entire jury or question the foreperson concerning the deadlock, and they urge this Court to mandate that trial judges poll the foreperson and then each juror before declaring a mistrial due to manifest necessity. See Appellant Reply Br. at 3. We decline to adopt such a rule here, as we agree with the Court of Appeals for the Seventh Circuit that, "[w]hile it is preferable that a jury be polled before dismissal [due to a mistrial], a trial judge is not under an obligation to conduct such a poll." Escobar v. O'Leary, 943 F.2d 711, 178 n.4 (7th Cir. 1991). Polling is only one of several factors to be considered in ascertaining whether manifest necessity exists in a particular case. See Webb, 516 F.2d at 1046 ([t]he trial judge *may* question the jurors") (emphasis added).

weigh in favor of a manifest necessity finding. Therefore, we will affirm the District Court's decision.

III.

For the foregoing reasons, we will affirm the decision of the District Court.

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
GELEAN MARK,	)
VERNON FAGAN,	)
WALTER ELLS,	)
DORIAN SWAN,	)
KELVIN MOSES, and	)
HENRY FREEMAN,	)
	)
Defendants.	)

Criminal No. 2006-80

ATTORNEYS:

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Jesse Gessin, AFPD
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For defendant Dorian Swan,

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St. Thomas, U.S.V.I.
For defendant Kelvin Moses,

Dale L. Smith, Esq.
New York, NY
For defendant Henry Freeman.

ORDER

Entered: January 20, 2008

GÓMEZ, C.J.

Before the Court is the motion of defendant Dorian Swan ("Swan") to dismiss the indictment on double jeopardy grounds. Additionally, Swan has moved to dismiss alleging that the government has engaged in prosecutorial misconduct.

The trial in the above-captioned matter took place between September 5, 2007, through October, 3 2007. The parties rested and the matter went to the jury during the fourth week of trial. After approximately three days of deliberation, the jury sent the Court a note indicating they were deadlocked and could not reach a unanimous verdict with respect to four of the defendants in Count One

of the Indictment. The jury also disclosed that they could not reach a unanimous verdict as to any defendant named in Counts Two and Fourteen. After consulting with counsel, the Court instructed the jury to deliberate further (the "*Allen* charge"), consistent with *Government of the Virgin Islands v. Gereau*, 502 F.2d 914, 935-36 (3d Cir. 1974).

After approximately two more days of deliberations, the jury returned a partial verdict of guilty with respect to defendants Gelean Mark ("Mark") and Henry Freeman ("Freeman") on Count One. After approximately one and a half hours of further deliberations, the jury sent another note to the Court indicating that they were still unable to reach a unanimous verdict with respect to Fagan, Ells, Swan, and Moses on Counts One, and on each of the defendants named in Counts Two and Fourteen.

The Court again conferred with counsel and discussed suggestions on how to proceed in light of the jury's inability to reach a unanimous verdict as to Fagan, Ells, Swan, and Moses on Count One, and on Counts Two and Fourteen. Thereafter, the Court declared a mistrial as to Fagan, Ells, Swan, and Moses on Count One, and on Counts Two and Fourteen. The Court found that manifest necessity required such a declaration, given the jury's inability to reach a unanimous verdict on those charges.

The Double Jeopardy Clause protects criminal defendants from later prosecutions for the same offense. *See* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."). Double jeopardy bars successive prosecutions where "the two offenses

charged are in law and in fact the same offense." *United States v. Felton*, 753 F.2d 276, 278 (3d Cir. 1985); *cf. United States v. Felix*, 503 U.S. 378, 387, 112 S. Ct. 1377, 118 L. Ed. 2d 25 (1992) ("[A] mere overlap in proof between two prosecutions does not establish a double jeopardy violation."). However, the Double Jeopardy Clause will not bar successive prosecutions for the same offense where a mistrial is required by "manifest necessity." *United States v. Rivera*, 384 F.3d 49, 53 (3d Cir. 1991); *see also United States v. Console*, 13 F.3d 641, 663-64 (3d Cir. 1993) (explaining that Double Jeopardy will not bar the re-prosecution unless the issue has been "necessarily determined in the defendant's favor by a valid and final judgment").

Manifest necessity is present when the circumstances leave the trial judge with "no alternative to the declaration of a mistrial. The trial judge must consider and exhaust all other possibilities." *Love v. Morton*, 112 F.3d 131, 137 (3d Cir. 1997) (citing *United States v. McKoy*, 591 F.2d 218, 222 3d Cir. 1979)).

Here, the jurors deliberated for several days. After receiving the *Allen* charge and deliberating for approximately two additional days, the jurors were still unable to come to a unanimous decision. As a result, the Court held that manifest necessity required the declaration of a mistrial. Under these circumstances, Double Jeopardy will not prevent retrial of Swan. *See Arizona v. Washington*, 434 U.S. 497, 509 (1978) ("[P]erhaps the clearest example of a situation in which manifest necessity exists for a mistrial is when a jury is unable to reach a verdict."); *United States v. Coleman*, 862 F.2d 455, 460 (3d Cir.

1988) (recognizing the 'manifest necessity' of retrial following a hung jury).[1]

Finally, Swan argues that this matter must be dismissed because the government engaged in prosecutorial misconduct. Swan claims that the government: failed to disclose discovery materials; made inflammatory remarks during the first trial and in its closing argument; attempted to testify *via* wiretap transcripts; allowed government agents to intimidate defense counsel; inappropriately used confidential informants; and wrongfully sealed documents filed in this matter. However, Swan has not offered any facts to support his claims that the actions of the government rise to the level of misconduct. Accordingly, it is hereby

---

[1] Swan cites *United States ex rel. Webb v. Court of Common Pleas of Philadelphia County*, 516 F.2d 1034 (3d Cir. 1975), for the proposition that no manifest necessity existed for a mistrial. In *Webb*, the Third Circuit held that Double Jeopardy barred retrial after a mistrial because it found that no manifest necessity existed for the trial judge's declaration of a mistrial due to a hung jury. *Webb*, 516 F.2d at 1043-44. However *Webb* is distinguishable from this case because the trial judge raised the issue of jury deadlock *sua sponte*, after only six and one-half hours of jury deliberation. *Id.* at 1036. The trial judge interrogated only the jury foreman as to state of jury's deliberations, and the foreman indicated that further deliberation would be fruitless. *Id.* Here, in contrast, the issue of jury deadlock was raised by the jury itself, which sent two different notes indicating that it could not reach a unanimous verdict as to some of the defendants and some of the counts. Moreover, this Court, unlike the trial court in *Webb*, gave the jury an *Allen* charge after and instructed it to continue deliberations after receiving the first note. Accordingly, the Court considers *Webb* to be inapposite.

ORDERED that Swan's motion to dismiss is DENIED.

Dated: January 18, 2008

/s/
CURTIS V. GÓMEZ
Chief Judge

Copy: Hon. Geoffrey W. Barnard
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Thurston T. McKelvin, FPD
Jesse Gessin, AFPD
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Mrs. Trotman
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

08-1177/1178/1312/1356/1358

UNITED STATES OF AMERICA

v.

GELEAN MARK,

Appellant

No. 08-1178

UNITED STATES OF AMERICA

v.

DORIAN SWAN,

Appellant

No. 08-1312

UNITED STATES OF AMERICA

v.

KELVIN MOSES,

Appellant

No. 08-1356

UNITED STATES OF AMERICA

v.

VERNON FAGAN,

Appellant

No. 08-1358

UNITED STATES OF AMERICA

v.

WALTER ELLS,

Appellant

Entered: August 19, 2008

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge,
SLOVITER, McKEE, RENDELL, BARRY,
AMBRO, FUENTES, SMITH, FISHER,
CHAGARES, JORDAN, and
HARDIMAN Circuit Judges

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

MICHAEL A. CHAGARES
Circuit Judge

DATED: August 19, 2008
tmm/cc: Delia Smith, Esq.
Pamela L. Colon, Esq.
Jesse A. Gessin, Esq.
Kevin F. D'Amour, Esq.

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GELEAN MARK, DORIAN SWAN,
VERNON FAGAN, HENRY FREEMAN,
KELVIN MOSES, and WALTER ELLS,

Defendants.

CRIM. NO. 2006-80

REPORTER'S TRANSCRIPT

JURY TRIAL
DAY 15

Tuesday, September 25, 2007

BEFORE:
THE HONORABLE CURTIS V. GOMEZ
Chief Judge

APPEARANCES:
OFFICE OF THE UNITED STATES ATTORNEY
BY: DELIA SMITH, AUSA
BENJAMIN BEARD, AUSA

For the Government

PAMELA COLON, ESQ.

For Defendant Mark

COURT REPORTER: CHANDRA R. KEAN, RMR
Official Court Reporter
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St. Thomas, Virgin Islands

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DALE L. SMITH, ESQ.

For Defendant Freeman

JUSTIN HARRELL, ESQ.

ANDREW CAPDEVILLE, ESQ.

For Defendant Moses

CARL WILLIAMS, ESQ.

For Defendant Ells

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(Court recessed)	

MS. SMITH: No.

THE COURT: What? I don't know what you --

MR. CAPDEVILLE: I was wondering if I could include that in my argument.

THE COURT: You're talking about a count that's not before the jury, you want to include in your argument? Absolutely not.

(End side-bar conference, open court as follows:)

THE COURT: All right. Attorney Smith, are you ready?

MS. SMITH: Yes, Your Honor.

Good morning, Your Honor.

THE COURT: Good morning.

CLOSING ARGUMENT BY THE GOVERNMENT

MS. SMITH: Good morning, ladies and gentlemen of the jury.

Good morning, counsel for defense.

It has been three and a half long, long weeks, with long, long days, and long, long testimony.

The only sentiment that is appropriate, given your dedication, your time and your commitment, is, thank you.

The only sentiment that is fitting for the hours, the days, the weeks, that you've spent in this courtroom is, thank you.

My name is Delia Smith. I'm here on behalf of the United States. I came before you with co-counsel, Benjamin Beard.

I came before you with many witnesses, 37, to be exact.

I came before you, ladies and gentlemen, and asked you to be patient.

I asked you to be open.

I asked you to listen.

I asked you to be attentive because I knew, I knew then that it would take days and weeks and countless hours to consider all this evidence.

Again, thank you for your time and your commitment.

But, ladies and gentlemen, I make little, if no, apology for the amount of evidence that I've presented in this case.

The reason being, ladies and gentlemen, as was told to you by this Court, the government bears the burden of proof.

It is an insurmountable burden, ladies and gentlemen, beyond a reasonable doubt. To meet this burden, it requires hours and days and weeks of testimony.

When I met you back on September 5th, ladies and gentlemen, I told you that on behalf of the government Mr. Glenson Isaac, he would call him up and say, "Where's my bag?"

That didn't happen. You would have heard evidence in this case that he called up Demeatra Cox and said, "Where's my bag?"

That didn't happen. Instead, the government simply asked her a question

THE COURT: Counsel, you have one more minute.

MR. SMITH: I'm not going to have an opportunity to speak to you, but you heard the evidence in this case.

Members of the Jury, the evidence does not establish beyond every reasonable doubt that Henry Freeman participated in a drug conspiracy.

Your verdict, therefore, must be not guilty.

Thank you.

THE COURT: Thank you, Attorney Smith.

Attorney Gessin.

MR. GESSIN: Thank you, Your Honor.

CLOSING ARGUMENT BY DEFENDANT SWAN

MR. GESSIN: Hello, ladies and gentlemen of the jury. Opposing counsel, co-counsel, court staff.

Thank you. Hello.

It's been a long, long, almost four weeks now, and Mr. Swan thanks you for your patience, and I thank you for your patience.

And at times, I realize that it's got heated, and at times I realized that my youthful exuberance has probably gotten the best of me. And I hope that you won't hold that against Mr. Swan.

And I thank you for looking at the evidence impartially.

The government has asked you to convict Dorian Swan solely based upon the testimony of Glenson Isaac. And they hope that you won't see the multiple inconsistencies in his interviews with agents, his

prior sworn testimonies, and the testimony before you.

They hope that you won't see, as Attorney Smith pointed out, the complete lack of corroboration.

They won't -- they hope you won't see how many of their own internal rules that they broke in bringing him before you.

And they hope that you won't see the truth, the truth that Dorian Swan is innocent.

Now, the, Chief Judge Gomez made various instructions earlier on. And one of those instructions, which I will continually go back to because that's, that's the law -- and he tells you what the law is. And one of those instructions is that an indictment is a formal method of accusing someone.

And when I stood up before you almost four weeks ago, I said that up to -- beginning in ancient times, all the way back to the Book of Deuteronomy, up through Roman civil law and the English common law, and today, when you accuse somebody, they are cloaked, the person being accused is cloaked in the presumption of innocence, and the accuser has the burden of proof.

And Judge Gomez -- Chief Judge Gomez has instructed you now three times, once when there was a jury being selected, once before opening statements, and now once more, that the government has the burden of proof.

And that's -- it's so important, there's no other thing that's been charged three times. That's how important it is. The only thing that's been, that's been instructed to you three times is the burden of proof. And it's ancient and it's sacrosanct.

And so that burden of proof is proof beyond a reasonable doubt, and that presumption is the presumption of innocence.

And at the beginning of the trial, he was cloaked in that presumption, and he's still cloaked in that presumption, and I'll submit to you that there's no evidence for any reason to remove that cloak from his body.

As the jury, you've been charged by Chief Judge Gomez that you, the jury, are the sole judge of the facts.

You take the evidence that either the government or the defense presents, and you set the facts. You say: This happened at this time, because we believe so and so's testimony, or we believe this and that picture.

And you're the only people that can decide that. You're the only ones who get to decide who you believe is telling the truth, and who you don't think is telling the truth.

And if you do believe they're telling the truth, then you can say, that happened on that day. And if you don't believe they're telling the truth, then you say, that didn't happen on that day. But you're the only ones.

Nobody else can tell you any different, because that's what Chief Judge Gomez told you. He said you're the sole judge of the facts.

When I get up here and say, and what my colleagues get up here and say, we're arguing, we're hoping to persuade you a certain way. But remember, you're the sole judge of the facts, the sole judge of credibility, the only people that get to

decide, "I'm going to believe him or her, I'm not going to believe him or her."

So it is that we go into the evidence that the government presented against Mr. Swan.

Chief Judge Gomez instructed you, this is like separate trials, or this is separate trials, and each defendant is entitled to a portion of the, a view in their own right to say, "Okay, this is the evidence against Mr. Swan," boom, boom, boom, boom, boom.

So it's, judge each defendant differently. That's what Chief Judge Gomez said. So let's look at judging Mr. Swan differently than everybody else, and just the evidence that's been presented against him.

The government's presented a lot of evidence. But quality -- quantity does not necessarily mean quality. And we all know the saying, it's quality over quantity. So let's look at the quality of the evidence against Mr. Swan.

You have all those young women who came in here and testified about money -- or bags going down, which they, they had never seen what was in the bags, except for that they were told what was in the bags.

But none of them ever mentioned Mr. Swan, not one; never even heard of a Mr. Swan, not one.

And then there's this, this Mr. Springette, Mr. James Springette. He didn't say anything about Mr. Swan, either, not once; never even said he heard of Mr. Swan, not once.

He had that big fancy chart that they put up on theboard. Mr. Swan wasn't on there. Nope, not even in one of those roles, not at all.

Then you had Stuart Taylor who came in here and talked. He didn't say a word about Mr. Swan. Not once. He never said he heard about Mr. Swan. Not once.

Then all those custodian records, the people that are from the hotels and the airlines, and they put up a bunch of records, and we all kind of sat there and watched them as the government went through each record, and then as the person said that's the record, that's the record.

And then they put it up, and then we went through it again, the record, the record. But not once did any of those records have Mr. Swan's name on it. Not one record, not one hotel bill, not one airline ticket; not one.

So it is that that is the majority of the government's evidence.

All of those witnesses that I just talked about -- excuse me. Let me talk about the agents.

The agents got up here. Out of all the surveillance videos that's in evidence, Mr. Swan is not on a single video.

Out of all those telephone calls that you heard, all those telephone calls, not once is he mentioned, not once is he talked, does he talk on any of those, on any of those calls. Not one.

Not a single photograph is Mr. Swan in, none of them that they showed you. That's it. That's the

majority of the government's evidence. That leaves two witnesses: Elton Turnbull and Glenson Isaac.

Elton Turnbull said that he had heard that Mr. Swan had a route from St. Croix to Maryland.

We had no further testimony about St. Croix or Maryland. We had no connection to Maryland, no rental car, no hotel bills, no airline tickets, no other witnesses. It was never mentioned again.

That was it.

What it's doing in this trial, I don't know. What I think happened was what Mr. Smith was talking out was, he said that Glenson Isaac and Elton Turnbull were writing letters back and forth and Elton Turnbull probably meant to say based on what he had gathered through Glenson Isaac was St. Croix, New York, but he messed it up.

Because when you lie, you spin a web, and the web just keeps getting bigger, and it's hard to remember what's on the outer end of the web, especially when there's so much more here in the middle.

But he got caught in untruth, and it was proved by the rest of the testimony from Glenson Isaac. And so this thing about St. Croix to Maryland, what most likely happened was that Mr. Isaac just messed up what he was supposed to say.

Dorian Swan doesn't have a route from St. Croix to Maryland. He lives in Atlanta. He's lived there for years. There's no other evidence showing that he has anything to do with St. Croix or Maryland; nothing.

It's just a mistake that Glen -- that Elton Turnbull made in trying to present a cogent story, a complete story with Glenson Isaac.

And it just got messed up along the way. It's part of that outer web. You shouldn't believe it.

Now, we have Glenson Isaac. Mr. Smith called it poison -- Attorney Smith called it poison. I just call it untruth. But it's untrue, because there's a lack of credibility, there's a motive to lie, there's inconsistencies, and there's vagaries, all as it relates to Mr. Swan.

I'm not going to put his testimony in some vacuum. I'm going to say: Look, this is how it applies to Mr. Swan, and this is why you shouldn't believe it.

But first, how does someone like Glenson Isaac get pulled in here?

Attorney Smith talked about that a little bit. But I was the one who did the cross-examination, based on that famous DEA manual.

Now, that's not law, that's not something that you need to follow. But what it is, it's operating guidelines for the DEA. So, say you're --

THE COURT: Stick to the evidence, what's in evidence.

MR. GESSIN: Yes, Your Honor.

So what I cross-examined about is, I cross-examined about whether or not -- why they had marked Glenson Isaac as a source of information, and as opposed to what's called a defendant informant.

And the reason was because with the source of information, you don't have to corroborate anything. The problem is, is that under the manual, a source of information is someone --

MS. SMITH: Objection, Your Honor.

THE COURT: Sustained.

MR. GESSIN: The difference is, is that you don't have to corroborate anything. You don't have to get, you don't have to do reports every three months. You don't have to have these people checked out by the higher-ups. That's the difference.

That's the key thing. And that's why he was marked the way he was in all their reports. Because if he was marked differently, they would have had to do different things, like get corroboration.

Now, another key thing is, there's no video or audio of any of the interviews. It's pretty easy to video an interview or to audio an interview, and then you'll just be able to take the interview and compare it to the prior testimony, and you can say, "Wow, that person is consistent."

That means there's a better chance they're telling the truth.

But there's none of that.

And when Mr. Isaac was up there testifying, they kept asking him questions that were -- and you kept hearing us object, leading, leading. Because that way he wouldn't have to remember what he was testifying about. He wouldn't have to say it truthfully, because it was said to him.

And you heard us, and it happened over and over and over again.

And how many times did he say he didn't recall when the government asked him questions?

But how many times -- rare, very rare.

But how many times did he say, "I don't recall," when the defense asked him questions?

It happened a lot, didn't it?

Now, let's talk about credibility. Let's talk about the jury charge. Chief Judge Gomez said to you all: Did he or she have any particular reason not to tell the truth?

Well, let's apply that charge to Glenson Isaac.

One, he's facing life imprisonment. Life. That's it. Throwing away the key.

Only if he makes a deal with the government is he going to get out of that life imprisonment, which is what he did. And the deal is that he's not sentenced yet. So the deal is, names for liberty. Names for liberty, that's the deal.

He starts out on a very low road. And this is someone that starts out, you got to question and say: Okay, he has a self-motivation to give up names and to make up testimony, and the more he gives, the better he's going to get.

Then you find out he gets money from the government, too. I think it was somewhere upwards of $25,000 so far. So he's getting money and liberty so far.

Then you find out that he has motives against, definitely, Dorian Swan. You heard about that situation down in Alabama, about the betting and all that stuff. There's a lot of stuff that wasn't

necessarily entered into evidence, but it was discussed in cross-examination.

Attorney, Attorney Smith just talked about a situation with Demeatra Cox. There are these back stories. He definitely had a motive. So he's got liberty, money, and a beef.

Starts out with that, and then we go into the question: What are the inconsistencies and what are the vagaries? Right?

The charge was: If you find a witness knowingly testified falsely about any important or material matter, you may distrust that witness' testimony about other matters. You may reject all the testimony of that witness.

That's what Chief Judge Gomez instructed you on. So let's go to the inconsistency.

Let's talk about the Bronx. Mr. Isaac – Glenson Isaac said that Mr. Swan met him in the Bronx.

Well, first he said that on multiple prior testimonies in his agents -- in his interviews with agents, he said May and June of 2003.

Then they gets in here, and for the first time he says June and July of 2003, completely inconsistent.

MS. SMITH: Your Honor, Your Honor -- inconsistency cannot be compared to a statement

THE COURT: All right. Overruled. Overruled.

MR. GESSIN: Then he says that -- in cross-examination I asked him, I said: Well, in your interview and -- in your interview and today, you said that there's some unknown person with Mr.

Swan. But you never said that in your prior sworn testimony, did you?

And he didn't.

There's another inconsistency.

Then he said something about traveling with his cousin. He said that in his interview, and he said that with you today.

But I asked him: Did you say that in your prior sworn testimony?

No. He didn't.

And then he says something about living with, he says he brings his cousin, so that way he can, he can know about New York City, because he doesn't know about New York City.

But then for the first time he admits that his aunt lives in New York City.

Where did that come from?

That was out of nowhere. And it makes no sense, why he would bring his cousin to a place where his aunt lives.

Moreover, where was the cousin?

But we'll get to that later. We'll get to that as part of the corroboration. We're just going over inconsistencies now.

Then he testified that he never travels with couriers, or courier or couriers taking cocaine, because, as he put it, that would be stupid.

But then he tells you that in either June or July or May, depending on which statement you want to believe, he traveled from North Carolina all the way

to New York with someone else, his cousin, and then traveled all the way back with cocaine, twice, even though, as he said, that would be stupid, and that's something he never does.

That's another inconsistency.

And these aren't small inconsistencies. These are major, major inconsistencies.

Now, let's talk about vagaries.

Judge Gomez instructed you, you can ask: Did the witness have a good memory?

Did the witness have the opportunity and ability to observe accurately the things that he or she testified about?

Well, let's ask those questions.

Mr. Isaac couldn't even get the months straight, let alone a day, a time, the weather, the location, what Mr. Swan was wearing, what the unknown person was wearing, what his cousin was wearing.

What were their actions?

What were they doing?

What was the location?

I mean, a three-month period, if he said a date and a time, maybe I could have investigated those things. But three months?

I'm not going to march Mr. Swan's friends up here and his family up here to tell you that they knew what he was doing for the three-month period in 2003, because you're not going to believe it. But that's what the government left us with. That's all they gave us. So there's no way for me to disprove it.

Except for one thing, that black BMW, which we'll get back to.

So he doesn't give us a time. He doesn't give us a day. He doesn't give us a location. All he says is some time, depending on which statement you believe, between May and July of 2003.

So let's talk about corroboration.

Was there anything to corroborate this story?

Anything?

He says he rented a car.

Where's the rental car receipt?

He says he went with his cousin.

Where's his cousin?

He says he called people on the cell phone to set up the deal.

Where's the cell phone records?

Where's the toll booth videos and toll booth receipts?

Is there any receipts from hotel?

Is his aunt there to corroborate it?

Is there any receipts from, from any sort of things that they bought when they stayed there?

There's nothing.

Why didn't the government set up a false buy?

He was, began cooperating in the spring of 2006, and Mr. Swan was indicted in December of 2006.

Why didn't they set up a buy?

Why didn't they call him and set up a false call?

Why didn't they, they send him in to talk with him when he's wired up?

Something, I mean, just something to prove it beyond what he says. And they're asking you to convict Mr. Swan, and they give you nothing beside his man's word, which has -- is filled with vagaries and inconsistencies, to the point where we can't even -- I, it leaves me to not even be able to, to be able to disprove it, because it's so vague.

Except for that black BMW, which we'll get to in a second.

So then they say that Dorian Swan is living in Atlanta, dealing drugs out of New York City.

Where is his apartment in New York City?

Where is his cell phone in New York City?

Where are his friends and his family in Atlanta, who say that he leaves to go to New York City every weekend?

Where is this stuff?

They don't produce anything. They just asked you just to believe it for the sake of believing it, like you don't, like you're not going to hold them to the burden of proof, like you're not going to question them and say he's cloaked in the presumption of innocence. He doesn't have to prove any of this. You do.

So why don't you prove some of this stuff?

Why don't you produce something? Anything?

Nothing. They produce nothing.

Does he have an apartment in New York, a Chinese food restaurant that can say he was there?

Anything?

Nothing.

Now, the black BMW is the only thing that was even close to being able to be confirmed by me. Nothing else could.

So what happened, Dorian Swan says -- no, Glenson Isaac says that Dorian Swan met him in a black BMW in 2003.

Well, it just so turns out Dorian Swan has a black BMW.

Yep, Glenson Isaac knows that. He's from the Virgin Islands. Dorian Swan is from the Virgin Islands. They all live in the South. They all heard about these dog fights. I'm not going to dwell on it. They all know each other. He knows he has a black BMW.

How it -- how he knows, I don't know. Maybe he heard it. Maybe he saw him. I don't know. Maybe they went to that dog fight in Alabama. He would know from that. But he knows he got a black BMW.

What he doesn't know is that he sold the black BMW and shipped it down here in February of 2002.

So what does he do?

He gets caught. He gets caught, just like Elton Turnbull got caught. And what happened was he showed you, with each registration, from each year, that that car was registered in the Virgin Islands in February of 2002, and again in 2003 and 2004 and 2005.

The government is going to get up here and say, it could have been a different one. He was in the passenger seat, this, that, the other thing.

Well, when they start saying maybe this, maybe that, what about this, what about that, then they've, they've already dropped their burden of proof, haven't they?

They haven't -- they haven't reached beyond a reasonable doubt, because then they're creating reasonable doubt. Just by them getting up here and saying that, that is reasonable doubt.

And that was the only thing that they left Mr. Swan to be able to prove or disprove, and he showed you it wasn't true, didn't he?

If he had given us a date, maybe we could have shown that. If he had given us a place, maybe we could have shown that. But they didn't, and we couldn't. And that's reasonable doubt.

Now, Mr. Isaac put up a chart.

Mr. Swan wasn't on that chart, was he?

When you have this massive lack of corroboration, plus a major issue with credibility, what that equals is that you shouldn't use his testimony in saying the facts. You shouldn't use it. You and you, ladies and gentlemen of the jury, alone, get to set those facts.

And when you have these glaring inconsistencies and these huge faults with this lack of corroboration, you shouldn't do it.

And when you don't use his testimony in accepting these facts, you have no evidence, none,

not a scintilla, not a pinch, not a tablespoon against Dorian Swan.

This is the last chance I'm going to get to address you. This is it for me.

So I just want to thank you for your, for your service, and I hope that you will see what's happening here, what's happening here is that you have May I publish to the jury, Your Honor?

THE COURT: It's in evidence?

MR. GESSIN: No, it's not in evidence. It's a demonstrative exhibit.

THE COURT: Has the government seen it?

MS. SMITH: Just now, Your Honor.

THE COURT: All right.

MR. GESSIN: A very simple demonstrative, Your Honor.

That's what you have. You have the truth. And you have the government slowly trying to cover up the truth, hoping you won't see the holes and the incredibility and all the problems that they've had with their case, the bags and whatnot. I'm not even going to go into that, because I don't think I need to.

Don't let them cover up the truth. And that truth, that truth is that Mr. Swan stands before you an innocent man.

Thank you.

THE COURT: Okay. Thank you, Attorney Gessin.

Attorney Williams.

CLOSING ARGUMENT BY DEFENDANT ELLS

MR. WILLIAMS: Speculation and conjecture. These are not my words. These are the words of the DEA Special Agent Michael Goldfinger when describing his reports, the reports he created during his investigation.

Michael Goldfinger is the supervisor, the case agent, the head honcho of this investigation, if you will. And his reports are speculation and conjecture.

Those aren't my words. My word would be "guesswork." But we will use the government's words, speculation and conjecture.

The documents and reports created by Michael Goldfinger were used by other agents. They were relied on by those agents in their investigation. The government relied on those reports and on the reports his stash location, the drugs that came in, and the money that were being made to send out. That was his stash location. And that's why Mia Moore was not welcomed inside of that apartment.

But it wasn't a problem for Kelvin Moses to stay there, because Mr. Moses knew. He was a part of the organization.

It wasn't a problem for Rasheed Creque, for Craig Claxton, for Kerry Woods; all stayed there. It wasn't -- they didn't have to hide anything from any of those people. They were members of the organization.

Now, ladies and gentlemen, all this focus is being placed that all these women came in here, and everybody have the same story.

The first thing is: Don't believe them, because they have the same story.

But then when they have an inconsistency, then don't believe them either or believe them. That's9 right. Believe them when it's inconsistent, but don't believe them when it is consistent.

You see?

You see the kind of confusion?

As far as the plans always being the same, those women were not responsible for those plans. Those plans were effectuated, planned, controlled, by Mr. Glenson Isaac.

And ladies, you -- and gentlemen, you know the old adage, right? If it ain't broke, don't fix it.

Why would they change anything, why would they change something in the operation?

No one was getting caught, ladies and gentlemen.

Why change it?

The money was corning through. Mr. Isaac was their cash cow, $190,000 a week. That was their golden egg, their silver dollar.

He was indispensable to this organization. Because cocaine ain't nothing if you can't sell it. And he was their cash cow.

We will argue that Mr. Isaac up there, he was the most important, the most important member of this organization. Because Mr. Springette's cocaine, Mr. Elton Turnbull's cocaine, Mr. Bob Hodge's cocaine, Mr. Gelean Mark's cocaine, ain't worth nothing if Mr. Isaac can't sell it.

You hear me?

So all of a sudden, Mr. Isaac is a, I think it was remittable -- unremittable -- unremitted liar. That's what he was called, an unremitted liar.

Well, ladies and gentlemen, he was a crook. He was a con man, a three-time convicted felon.

Do you have any idea --

THE COURT: I have no idea.

MR. GESSIN: Okay.

THE COURT: All right. Have a pleasant evening, Counsel.

(Court recessed at 6:47 p.m.)

CERTIFICATE

This document is hereby certified
to be a true and accurate transcript
of the foregoing proceedings.

/s/ Chandra Kean, RMR
Chandra Kean, RMR
Official Court Reporter

2-21/08
DATE